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No. 02-693

IN THE

# Supreme Court of the United States

John M. Lamie,

*Petitioner*,

v.

United States Trustee.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief demonstrated that 11 U.S.C. 330(a)(1) contains an obvious drafting error with respect to the power of courts to compensate debtors' attorneys. Section 330(a)(1) functions as a series of inextricably intertwined parallel references: "the court may award to a trustee * * * reasonable compensation for actual, necessary services rendered by the trustee"; it may award compensation to "an examiner" for services of the "examiner"; and it may award compensation to "a professional person employed under section 327 or 1103" for services of the "professional person." Section 330(a)(1) also expressly empowers the court to pay reasonable compensation for the services of the debtor's "attorney," but it does not specifically name the attorney as an authorized recipient of the compensation. Congress thus either inadvertently included the attorney in the "providers list" or it inadvertently omitted the attorney from the statute's "payees list."

This case calls on this Court to resolve the ambiguity in Section 330(a)(1) with its standard tools of statutory construction, augmented by the special canons applicable in bankruptcy. This manifestly is *not*, as respondent urges, a case in which one construction or the other can be sustained only on a heightened showing that the statute's literal terms should be ignored as a "scrivener's error." Neither the construction pressed by respondent, nor the contrary view of most courts, permits "[e]nforcing the statute as written." Contra Resp. Br. 6. This Court could adopt respondent's construction only by reading out of Section 330(a)(1) the authority expressly conferred by Congress for bankruptcy courts to pay compensation for the services of the "attorney." Indeed, respondent and the majority below admit that their interpretation renders that central provision "superfluous." *Id.* 16 (quoting Pet. App. 9a). Both parties thus agree that the statute contains a drafting error; the disagreement is what that error is. So neither petitioner nor respondent bears a burden of showing that "Congress unquestionably intended to" adopt its view or "could not have rationally intended" the contrary, for neither position

calls for an interpretation that conflicts with the result genuinely compelled by the literal language. Contra Resp. Br. 5, 31.

Respondent's litany of decisions reiterating the uncontroversial proposition that this Court "does not have '*carte blanche*' to redraft statutes" (Resp. Br. 11 (quoting *United States* v. *Locke*, 471 U.S. 84, 95 (1985))) thus does not advance its position. These cases each involve clear, grammatically correct, and internally consistent statutory language. See, *e.g.*, *Iselin* v. *United States*, 270 U.S. 245, 250 (1926) (noting statute was "evidently drawn with care"); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989) (citing "coherent and consistent" statutory scheme and "precision" of language and grammar). In contrast, where coherence and consistency are lacking, and where the text of one provision in isolation is ambiguous, this Court looks to the structure of the statute as a whole as well as to other evidence of legislative intent. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 90 (2001) (concluding, in light of an internal inconsistency in a statute, that Congress must have made a drafting mistake, and resolving that mistake); *Hartford Underwriters Ins.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6-8 (2000) (looking to "contextual features" of the Bankruptcy Code as well as "pre-Code practice and policy considerations"); *United States* v. *Granderson*, 511 U.S. 39, 44-53 (1994) (considering internal consistency within statute, stated legislative purpose, legislative history, and policy concerns).[1]

---

[1] Even in a traditional "scrivener's error" case – *i.e.*, a case in which the Court must choose between a literal reading of the text and a departure from it, rather than (as in this case) between two alternate means of resolving an inconsistency in the text – this Court will not impose a special, dramatically heightened standard to justify the departure, but rather will "look to the provisions of the whole law, and to its object and policy," to determine Congress's intent. *United States Nat'l Bank* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 545-55 (1993) (citation omitted). Although in *National Bank* the Court noted that "overwhelming evidence" supported its view, it did not suggest that such evidence was required. *Id.* at 462. Contra. Resp. Br. 12.



As petitioner now shows, his reading is supported by each relevant tool of statutory construction. Further, there is no merit to respondent's contention that the omission of the word "attorney" from the payees list in the 1994 amendment to Section 330(a) was purposeful because it furthers supposed policy goals.

## I. The Inherent Ambiguity In Section 330(a), As Amended In 1994, Is Properly Resolved By Concluding That Congress Did Not Intend To Revoke The Century-Old Authority Of Courts To Compensate Counsel For Services Necessary And Beneficial To The Estate.

The interpretative question before the Court is straightforward: who has the better reading of Section 330(a)(1)? The answer is plain; indeed, it is not seriously disputed. Stripped of its contention that petitioner must show that the Fourth Circuit's reading is "absurd," respondent does not genuinely contend that its is the superior interpretation.

1. As petitioner's opening brief detailed, Congress carefully considered and expressly addressed the authority of bankruptcy courts to compensate counsel in the Bankruptcy Act of 1898 and the Bankruptcy Code of 1978. Acting specifically to overturn cases reading this Court's General Order 30 to forbid compensation (see Pet. Br. 39 & n.9), Congress in the 1898 Act authorized compensation from estate funds in all forms of bankruptcy for services "rendered in aid of the administration of the estate and the carrying out of the provisions of the Act" (*Conrad, Rubin & Lesser* v. *Pender*, 289 U.S. 472, 476 (1933)). When federal bankruptcy law was thoroughly revised in 1978, there was no serious suggestion in Congress that this power should be repealed; to the contrary, Section 330(a) was adopted to authorize compensation more broadly. Pet. Br. 41-42.

Under the 1898 Act, courts awarded limited fees based on a principle of "severe economy * * * so as to reduce to the lowest minimum the costs of administration." *In re Lang*, 127 F. 755, 757 (W.D. Tex. 1904) (internal citation omitted). In enacting Section 330 in 1978, by contrast, Congress determined that, although fees "should be closely examined by the court,"

"[n]otions of economy of the estate in fixing fees are outdated and have no place in [the] bankruptcy code." 124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) (definitive joint statement of floor managers, per Rep. Edwards), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6436, 6442.

Respondent does not contest this history. See Br. 32-33. And although respondent contends that *petitioner* cannot show a pellucid intention by Congress to retain the right to compensate counsel (see *infra* at 5-10), respondent does not argue that there is a clear statement in the text or legislative record of an intent to deviate from past practice. Those concessions are essentially dispositive of the question presented, for respondent's position would clearly work "a fundamental change in the law" that would be "inconsistent with current case law." 3 Collier on Bankruptcy ¶ 330.LH[5] (15th ed. 2002). Indeed, the essence of respondent's textual argument is that the 1994 Act represented a substantial change from prior practice that Congress could not have overlooked. However, this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990). If not in text, there must be "at least some discussion in the legislative history." *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992). Congress adopted the 1994 Act against the backdrop of that settled canon.

Respondent only reinforces the point. It contends that the plain statement canon would apply only if the terms of Section 330(a)(1) "were unclear on their face or to resolve issues not explicitly addressed by the text." Br. 32-33. Respondent reiterates that its sole contention is that "Section 330(a)(1) is plain on its face in removing the statutory basis for awarding counsel fees to chapter 7 debtors' attorneys." *Id.* 33. But as petitioner has shown – and respondent concedes in admitting that its reading renders "superfluous" the courts' statutory authority to pay compensation for the services of the "attorney" (*id.* 16) – the text is ambiguous, not plain. Because there is no clear statement by Congress in the text or the legislative history of an intent to depart from nearly a century of settled bankruptcy



practice in the 1994 amendment (see *infra* at 5-10), Section 330(a)(1) is properly understood to maintain the authority to compensate the debtor's counsel from the assets of the estate.

2. Respondent fails to undermine petitioner's showing that his construction is more faithful to the statutory text. Respondent, like the majority below, principally reasons not from the text of Section 330(a)(1) as currently enacted, but from the contrast between that text and the 1978 version's explicit reference to the debtor's counsel in the payees list. Respondent contends that "[t]he omission is the most direct and obvious means" of limiting the compensation paid for the services provided by debtors' counsel. Resp. Br. 5.

That simply is not so. The "direct" and "obvious" approach would have been to amend not just one isolated reference to the attorney's right to compensation, but all of the provisions relating to that authority (including Section 330(a)'s providers list, 11 U.S.C. 331, and 28 U.S.C. 586(a)(3)(A)), without simultaneously enacting other provisions that necessarily presume the availability of fees for attorneys (11 U.S.C. 330(a)(4)(B)) and that govern the award of those fees (*id.* § 330(a)(4)(A)). Further, as between the payees list and the providers list, if Congress actually intended to eliminate or limit the availability of compensation, it would have amended the latter. But it did not, instead leaving unaltered the court's explicit authority in the providers list to pay "reasonable compensation for actual, necessary services rendered by *the* * * * *attorney*." 11 U.S.C. 330(a)(1) (emphasis added). Congress in 1994 merely omitted a provision that addresses the ministerial act of turning the compensation over to the attorney.

Although Section 330(a) is inartfully phrased on any reading, at least petitioner's interpretation gives meaning to each of its terms. Respondent's contention that petitioner would read additional terms into the statute is incorrect. As just noted, Congress retained in the providers list the power to award compensation for the attorney's services. The 1994 omission of the attorney in the provision addressing the act of transmitting otherwise-authorized compensation is a relatively minor error that would ordinarily be overlooked as unremarkable. In any

event, as petitioner's opening brief explained, compensation is separately authorized by Section 503 of the Bankruptcy Code, which broadly authorizes "payment of administrative expenses to the extent they represent 'the actual, necessary costs and expenses of preserving the estate.'" Pet. Br. 18 (quoting 11 U.S.C. 503). Respondent's brief ignores this font of authority.

3. Petitioner's reading similarly best makes sense of both the statutory structure and its object. Respondent's position is supported, at best, by the omission from the payees list "in isolation," whereas petitioner's reading prevails because it is most consistent with the "statute[] as a whole" (*United States* v. *Morton*, 467 U.S. 822, 828 (1984)), particularly given that construction of the Bankruptcy Code is a uniquely "holistic endeavor" (*United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)). The 1994 amendment to Section 330(a) added provisions that contemplate the continued availability of attorney's fees under Section 330(a)(1). Congress enacted procedures for the court to reduce fee awards on the basis of objections by third parties (Section 330(a)(2)), specific standards for evaluating fee applications (330(a)(3)), threshold requirements for receiving fees (330(a)(4)), and offsetting rules to account for "interim compensation" already awarded (330(a)(5)).[2] Petitioner reads these provisions, as Congress intended them, to govern fee awards to the debtor's attorney under Section 330(a)(1). Congress sought to ensure judicial

[2] Respondent correctly notes that, on its reading, a "debtor's attorney" in Chapters 12 and 13 is *literally* eligible for interim compensation as required by Sections 330(a)(5) and 331. Br. 22. But because Chapter 12 and 13 reorganizations generally involve "relatively standardized services" (*In re Kimber*, No. 00-14333, 2001 Bankr. LEXIS 1506, at *7 (Bankr. D. Colo. Sept. 7, 2001)) paid for with "flat fees" (*In re Pineloch Enters.*, 192 B.R. 675, 678 (Bankr. E.D.N.C. 1996)), there is no *practical* reason Congress would have enacted a provision that contemplates the use of interim compensation for just those cases. See, *e.g.*, *In re Campbell*, 259 B.R. 615, 620 n.3 (Bankr. N.D. Ohio 2001) ("the flat fee of $750 is an amount that many Chapter 13 counsel charge a debtor for handling a routine Chapter 13 case").



scrutiny of fee awards (see, *e.g.*, 140 Cong. Rec. S14,597 (daily ed. Oct. 7, 1994) (Sen. Metzenbaum)) – scrutiny that would be impossible if those fees were eliminated.

Petitioner's position is specifically supported by Congress's 1994 enactment of Sections 330(a)(4)(A) and (B). The former permits the award of fees only for services "necessary to the administration of the case" or "likely to benefit the *estate*" (emphasis added). The latter provides that fees may be awarded to an individual debtor's counsel in cases under Chapters 12 or 13 for "representing the interests of the *debtor*" (emphasis added). Petitioner contends that subsection (a)(4)(A) announces a general rule limiting the availability of fees for, *inter alios*, debtors' attorneys, and that subsection (a)(4)(B) creates a special exception to that general rule which expands the availability of fees under Chapters 12 and 13. By contrast, respondent contends that subsection (a)(4)(A) does not apply to fee awards to the "debtor's attorney" for services benefiting the estate (which it says are not permitted), and that subsection (a)(4)(B) permits limited fees in Chapter 12 and 13 cases. The disagreement matters because if petitioner is correct that the 1994 Act codifies a general rule providing for the availability of attorney's fees in subsection (a)(4)(A), Congress could not have intended to eliminate those very fees in the same statute. Petitioner's reading is superior for several reasons.

*First*, the text plainly states that subsection (a)(4)(B) is an exception that expands the availability of fees that could otherwise be awarded in Chapter 12 and 13 cases. The limitations on fees in Section 330(a)(4)(A) constitute a general rule applicable to all fees "*[e]xcept* as provided in subparagraph (B)" (emphasis added). Only petitioner's reading treats the provisions of subsection (a)(4)(B) as such an "exception" to the general rule of subsection (a)(4)(A).

*Second*, Congress could not logically have intended, as respondent supposes, that counsel for Chapter 12 and 13 debtors would be eligible for compensation for services that benefit the "debtor" but *not* for services that benefit only the debtor's "estate." Respondent does not dispute that the *sine qua non* of the availability of fees in bankruptcy has always been benefit to

the estate. See Pet. Br. 24. But under respondent's novel reading, a Chapter 12 or 13 debtor's counsel is inexplicably ineligible for attorney's fees for services that benefit only the estate – for example, those that provide creditors with information regarding the availability of assets to satisfy their claims.

*Third*, on respondent's view, attorney's fees in Chapter 12 and 13 cases would implausibly not be subject to Section 330(a)(1). Section 330(a)(1) incorporates Section 329, which permits the court to terminate or modify fee agreements. Section 330(a)(1) grants the U.S. Trustee and other parties the right to object to fee applications. And Section 330(a)(1), unlike Section 330(a)(4)(B), confers the right to reimbursement for expenses. Congress could not have intended that each of these provisions would apply to *every* type of fee application in bankruptcy *except* attorney's fee applications filed by individual Chapter 12 and 13 debtors.

*Finally*, there is no merit to respondent's *expressio unius* argument (Br. 18) that Congress's failure to list Chapter 7 debtors' counsel in subsection (a)(4)(B) implies an intent to eliminate the availability of attorney's fees in such cases. That Congress authorized additional compensation in some Chapter 12 and 13 cases for services that benefit the "debtor" does not suggest a corresponding intention to abandon – and is in fact logically unrelated to – the general authority to pay compensation for services benefiting the "estate."

4. Respondent could, at least conceivably, rescue its reading of the 1994 amendment if it could establish that Congress gave genuine consideration to deleting the courts' longstanding authority to pay counsel. By showing that the omission of the attorney from the payees list was purposeful, respondent arguably could explain Congress's failure to delete the parallel reference in the providers list as an inadvertent oversight in pursuit of this deliberate goal. (Yet it would remain doubtful that Congress would have intended to eliminate the availability of attorney's fees when the 1994 amendment's obvious overriding object was enhancing judicial scrutiny of fees rather than forbidding those fees outright.) The legislative



record, however, makes clear that Congress omitted the "attorney" from the payees list accidentally.

As discussed in the leading bankruptcy treatise, the omission occurred as a result of a final change to a "last minute addition * * * to the 1994 Act." 3 Collier ¶ 330.LH[5], at 330-75. The revision to Section 330(a) occurred on the final day the 1994 Act was considered, along with numerous amendments, by the Senate (April 21, 1994). Five months later, the bill was introduced in the House and passed the next day (October 5, 1994). In only one day (October 6, 1994), it was returned to, and passed by, the Senate. Respondent's emphatic claims that Section 330(a) was pending for "*over five additional months*" before enactment (Br. 27 (emphasis in original)) and was the subject of "over a year of deliberations" (*id.* 29) are thus misleading. The "five months" was a period in which the bill was not pending in either chamber. The "year" refers to the seven-month stretch before the relevant amendment was made to Section 330(a) and the five-month period in which neither the House nor the Senate had the bill before it.

It is also obvious how the inadvertent omission occurred. The reference to the debtor's attorney in the payees list was dropped when the succeeding clause was deleted and then reinserted in another place. The drafter simply struck out too much text, a conclusion reinforced by the fact that the deletion extended to the necessary conjunction "or." See Pet. Br. 25-30. As respondent itself points out, that subsequent clause and the amendment as a whole involved the review of fee applications by the U.S. Trustee, which is "an entirely different subject matter" from the courts' authority to award fees. Br. 30; see also 3 Collier ¶ 330.LH[5], at 330-73; Norton Bankruptcy Law and Practice § 26:5, at 206 (2d ed. 1997 Supp.). Although respondent asserts that "[i]t is exceedingly unlikely that the statute's drafters * * * failed to notice" the omission (Br. 30), the last-minute nature of the change makes it not unlikely at all, as *even respondent* implicitly acknowledges in arguing that Congress inadvertently overlooked its "fail[ure] to make corresponding changes" in the providers list (*id.* 15). Indeed, petitioner's opening brief demonstrated, and respondent does not

contest, that the 1994 amendments introduced numerous other obviously inadvertent errors into the Code. Pet. Br. 27 n.5.

The sequence of the amendment's transformation from a last-minute cut-and-paste job to federal law indicates that this is no more than an instance in which a reorganization caused a statutory reference to be "lost in the shuffle" (*United States* v. *Wilson*, 503 U.S. 329, 336 (1992)), a fact that this Court can and will recognize without some specially persuasive showing that Congress made a scrivener's error (*id.*). Here, as in *Wilson*, "Congress entirely rewrote [the statute] when it changed it to its present form": "It rearranged its clauses, rephrased its central idea * * *, and more than doubled its length." *Id.* Indeed, there is even more reason to recognize that the omission was inadvertent here than there was in *Wilson*, because here the Court can determine "what happened to the [missing] reference" (*id.*): the drafter inadvertently omitted the "attorney" in an entirely unrelated, "last-minute change" (3 Collier ¶ 330.LH[5], at 330-75) to the adjoining clause in the statute. Cf. *Fulman* v. *United States*, 434 U.S. 528, 539 (1978) ("we will not read legislation to abandon previously prevailing law when, as here, a recodification of law is incomplete or departs substantially and without explanation from prior law").[3]

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[3] Respondent's repeated emphasis that the omission was noted without objection in the House does not support its view that Congress acted purposefully. The cited reference is buried in a single sentence of written testimony for a House hearing that appears in a 718-page hearing record. *Bankruptcy Reform: Hrg. on H.R. 5116 Before the Subcomm. On the Economy and Comm. Law of the House Comm. On the Judiciary*, 103d Cong., 2d Sess. 551 (1994). Respondent's contention that the point was made by the National Association of Consumer Bankruptcy Attorneys (NACBA), which respondent contends is the nation's most expert organization on these questions (Br. 27-28, 32), is genuinely strange. Respondent has either forgotten or decided to ignore that NACBA filed a brief *in this very case* explaining that the Fourth Circuit's refusal to recognize that the omission of "the debtor's attorney" was an inadvertent error that if not recognized as such would have a "pernicious real world effect" on the orderly administration of bankruptcy proceedings. See NACBA Cert. *Amicus* Br. 6. (NACBA's position was stated sufficiently clearly at the cert. stage that it was unnecessary to file a duplicative merits *amicus* brief.) Although respondent contends that NACBA did not oppose the 1994 amendments because it believed the change was not problematic, NACBA's statement makes clear (as does its brief in this case) that the organization believed Congress or the courts would ignore the omission as "inadvertent." *Hrg. on H.R. 5116*, *supra*, at 551.

Respondent's invocation of "subsequent" legislative history is flawed for the reasons set out in petitioner's opening brief, which respondent ignores. The bills that would have corrected the omission of "attorney" contained numerous other provisions that could have caused them not to pass. And given that most courts have deemed the omission unintentional, it is not surprising that Congress found it unnecessary to intervene. See Pet. Br. 30.



## II. Respondent's Contradictory Policy Arguments Do Not Call For A Different Result.

Although respondent advances policy arguments that it contends support its position, the fact that those arguments are mutually inconsistent and unsupported by the legislative record demonstrates that respondent's position is at best a *post hoc* rationalization and not an accurate reflection of Congress's intent. That conclusion is reinforced by the undisputed fact that Congress expressly considered and rejected these very policy arguments in enacting Section 330(a) in 1978. On the one hand, respondent hypothesizes that Congress "rationally could have determined" (Br. 6) to eliminate the availability of fees for debtors' attorneys under Section 330(a)(1) in order to prevent attorneys from "siphoning off" estate assets in Chapter 7 cases or as leverage to discourage debtors from pursuing relief under Chapter 7 rather than Chapters 12 and 13. On the other hand, respondent takes the opposite position that such a policy choice would be essentially meaningless because attorneys will still be paid under the Code from the assets of the estate, including in Chapter 7, because (*inter alia*) they may be hired by the trustee.

If Congress had concluded that any of these were genuinely "[s]ubstantial policy reasons" for the 1994 amendment (Resp. Br. 35), it would have pursued them coherently, and those reasons would have been acknowledged *somewhere* in the legislative history, whether by a legislator, by respondent in its own comments on the Act, or by at least a witness. But the entire history of the Act contains not a single instance in which anyone made those arguments, or even expressed more general concern regarding the longstanding availability of Chapter 7 attorney's fees. That silence is deafening here, for respondent is asking this Court to read the last-minute omission of one reference to the "attorney" in Section 330(a)(1) as embodying a significant change in bankruptcy policy that Congress consistently rejected for nearly a century. See *supra* at 3-4.

Further, respondent's claim that it is presenting an "experience[d] and considered view" on these policy matters (Br. 38) – like its quotation of its own public relations materials stating that it "acts in the public interest" (Br. 1 (quoting http://www.usdoj.gov/ust/mission.htm)) – rings hollow. Neither prior to nor in the course of the 1994 revision to Section 330(a)(1) did respondent suggest the change in the availability of fees that it now reads into the statute.

Rather, respondent's position is openly directed at arrogating to itself authority that trustees were *not* granted by Congress. The 1994 amendments to Section 330(a) conferred on the U.S. Trustee the right to review and comment on fee applications, including those submitted by debtors' attorneys. See 11 U.S.C. 330(a)(1), (2). But respondent would convert the amendment into the much broader authority – which the U.S. Trustee has never possessed – to control which attorneys are retained in the first instance. It thus contends that attorneys in Chapter 7 cases may be paid from estate funds *only if hired by the trustee*. See Resp. Br. 6-7. All the available evidence refutes the suggestion that Congress intended such a sweeping expansion of trustees' powers.[4]

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[4] Respondent's assertion that it is not the *courts* but "the United States Trustees[] who are charged with supervising the administration of bankruptcy cases" (Resp. Br. 7) is contradicted by the very statute respondent cites. The "supervis[ory]" authority of the U.S. Trustees that respondent invokes with respect to attorney's fees does not include acting on fee requests (that is the court's responsibility (see 11 U.S.C. 330(a)) but instead is limited to "reviewing * * * applications filed for compensation and reimbursement under section 330" and "filing with the court" any "comments [or] objections to such application[s]" (28 U.S.C. 586(a)(3)(A)). This responsibility applies "in cases *under chapter 7, 11, 12 or 13.*" *Id.* (emphasis added). But respondent reads Section 330(a) to forbid Chapter 7 debtors from submitting attorney's fee applications.



As petitioner now shows, in the 1994 amendments, Congress was not pursuing the policies suggested by respondent.

1. Respondent opines that the 1994 omission of "debtor's attorney" may have been intended to preserve the assets of the estate because "under petitioner's interpretation" debtors supposedly would "siphon funds from the estate to pay the debtor's attorney" (Br. 37 n.10) and "divert[]" those funds from creditors (*id.* 6). The legislative history on which respondent relies, however, undermines its claim. Although the sponsor of the 1994 amendment (Senator Metzenbaum) expressed concern over excessive attorney's fees being awarded in large corporate reorganizations (140 Cong. Rec. at S14,597), those cases are overwhelmingly Chapter 11 "debtor in possession" proceedings, which is the lone category of cases that respondent contends was *unaffected* by the 1994 amendment. Indeed, the prototypical example cited by Senator Metzenbaum was the Chapter 11 reorganization of Colt Manufacturing. See *id.* (citing Laurence Zuckerman, *Judgment Day for a Legal Powerhouse*, N.Y. Times, Sept. 25, 1994, at C2). Further, respondent quotes Senator Metzenbaum's statement that he was "particularly pleased that [his] proposal relating to professional fees [was] included in the act" (Br. 31), but omits that the proposal was (as the *next sentence* of the Senator's statement explains) not the elimination of fees in any cases but the enactment "in clear and concise terms [of] those factors that must be considered when

deciding the appropriateness of the fee request" (140 Cong. Rec. at S14,597).

As an entirely separate matter, respondent's argument rests on an important misstatement of basic bankruptcy law. The 1978 Act specifically rejected the view that attorney's fees waste estate assets. See *supra* at 3-4. Congress in the 1994 Act then adopted Senator Metzenbaum's proposal to codify the rule that courts may approve fees for services "likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. 330(a)(4)(A). See generally 3 Collier ¶ 330.03[3], at 330-25. Respondent inexplicably ignores not only this central provision but also the many cases demonstrating that courts rigorously scrutinize fee applications. See Pet. Br. App. 33a-35a. If a fee application involves an actual "diver[sion]" of funds that should be paid to creditors, it will be denied.

Further, on respondent's reading, Chapter 7 attorney's fees will *still* be paid from the assets of the estate, albeit in a way Congress could not have intended. Respondent contends that attorneys will be retained by the trustee and/or will receive a pre-petition retainer from the debtor. Br. 36-37. The funds to pay an attorney hired by the trustee are paid from the estate under Section 330(a)(1). Similarly, the funds for a pre-petition retainer would otherwise form part of the estate. 11 U.S.C. 541(a)(1). By encouraging the use of such retainers, respondent's position perversely reduces the court's authority to scrutinize payments to attorneys. See Pet. Br. 35-36 (explaining that pre-petition retainers are subject to less rigorous review under Section 329(b) than are fees under Section 330(a)). This case – in which the bankruptcy and district courts agreed that the retainer petitioner was paid by his client was "reasonable" without scrutinizing the services petitioner provided – is a perfect example.

In any event, respondent's reading of the 1994 amendment to Section 330(a) would not reduce the availability of fees only under Chapter 7. It would more broadly eliminate the authority to pay debtors' counsel for services necessary and beneficial to the estate in most bankruptcies: those under Chapters 7, 12, and 13, as well as under Chapter 11 if the debtor is "out of



possession." Respondent repeatedly mischaracterizes the issue as implicating Chapter 7 alone, acknowledging only at the end of its brief that it reads the 1994 amendment as eliminating the power to pay such fees not merely "in chapter 7 cases" but also in "chapter 11 cases where a trustee has been appointed." Br. 35. Even this statement omits that courts would have no authority to pay fees either (i) to counsel for individual Chapter 12 and 13 debtors for services that benefit the estate but not the debtor or (ii) in any cases involving Chapter 12 business debtors. See 11 U.S.C. 330(a)(4)(B).

2. Nor does respondent have a persuasive explanation for why Congress in 1994 would have intended to eliminate the availability of attorney's fees in many Chapter 7 cases while simultaneously expanding the availability of fees under Chapters 12 and 13. Throughout the history of federal bankruptcy law, the authority to award fees has applied uniformly to all forms of bankruptcy, and there is no substantial reason Congress would have intended for the first time to, *sub silentio*, draw the distinction hypothesized by respondent.

Respondent contends that in cases under Chapters 12 and 13, as well as when a Chapter 11 debtor is "in possession," the debtors "pursue along with creditors the common goal of crafting a repayment plan to pay creditors from an estate that includes post-petition assets and income." Br. 35. By contrast, under Chapter 7, the estate is administered by a trustee and involves liquidation rather than repayment. *Id.* 36. But respondent has done no more than identify commonalities and distinctions among some kinds of bankruptcy. Innumerable other lines could be drawn. For example, Chapter 7 and 11 cases involve larger estates while Chapters 12 and 13 are subject to defined income limits. Chapters 7, 11, and 12 involve businesses and therefore more complex reorganizations while cases under Chapter 13 only involve individuals. But none of these comparisons, including those made by respondent, relates to whether Congress intended fees to be paid from the estate.

Respondent's argument that "Chapter 7 is a zero-sum game in which any funds diverted from the estate to pay attorneys reduce the amount of funds available to pay creditors" (Br. 6)

misapprehends how Chapter 7 operates. Neither the claims against the estate nor the assets of the estate are finally established at the point a bankruptcy petition is filed. Rather, the debtor and the trustee often work to reduce the claims against the estate and maximize the value of the assets. Debtor's counsel assists the trustee in pursuing adversary proceedings that will generate funds for the estate, including avoiding "preferences" to increase the size of the estate for creditors (see, *e.g.*, 11 U.S.C. 547-550), cooperates with the trustee examining proofs of claim filed against the estate (see Bankr. R. 4002(4)), and takes steps to ensure that the bankruptcy process operates smoothly (such as providing information to the affected parties) to ensure that the estate's funds are properly distributed to creditors (see 11 U.S.C. 521).

3. Respondent alternatively emphasizes that one goal of the 1994 amendments to Section 330(a) was to encourage individual debtors eligible for treatment under Chapters 12 and 13 to reorganize under those provisions. Br. 26-27. That fact is no help to respondent because that objective was pursued through the enactment of Section 330(a)(4)(B), not any change to Section 330(a)(1). See *supra* at 6-9. Respondent imagines that Congress might have omitted the prior authorization to pay debtors' counsel from subsection (a)(1) as the "stick" to accompany the "carrot" of newly enacted subsection (a)(4)(B), hypothesizing that "Congress rationally could have sought to * * * encourage the use of chapter 13 by precluding debtors' attorneys from seeking compensation from chapter 7 estates." Br. 26-27. Respondent offers only one piece of support for this unusual theory, in which Congress begrudges compensation for services that are "necessary" or "beneficial" to the estate. It is Senator Heflin's statement that his amendment to Section 330(a) would encourage Chapter 13 filings. Br. 24-25 (quoting 140 Cong. Rec. S4507 (daily ed. Apr. 20, 1994)). But respondent concedes that this statement was made "before the phrase 'or the debtor's attorney' was deleted from the bill" (*id.* 24), as it refers instead to the provision that became subsection (a)(4)(B).

Further, only petitioner's construction is consistent with Congress's goal of encouraging resort to Chapters 12 and 13.



Under any reading, Section 330(a)(4)(B) provides that *individual* Chapter 12 and 13 debtors may compensate their counsel for services that benefit the *debtor*. But respondent's reading prohibits attorney's fees in Chapters 12 and 13 in important circumstances, and it is therefore less likely to encourage use of Chapters 12 and 13. Only petitioner's reading permits *business* Chapter 12 filers to pay fees and furthermore permits debtors to compensate their counsel for services that benefit only the debtor's *estate*.

Respondent would also read the statute as a blunderbuss that is inconsistent with the statute's supposed purpose of encouraging individual debtors to pursue relief under Chapters 12 and 13. Chapters 12 and 13 are limited to, respectively, "family farmers with regular annual income" (11 U.S.C. 109(f)) and "individuals with regular income" but certain maximum debts (*id.* § 109(e)). Of *particular* importance, the great majority of the approximately 40,000 Chapter 7 filings that respondent contends involve ongoing attorney's fees under Section 330(a)(1) are likely to be more complicated business liquidations *ineligible* for treatment under Chapters 12 and 13. It is no coincidence that the 40,000 figure is roughly comparable to the annual average of approximately 34,500 Chapter 7 bankruptcy filings by businesses. See http://www.uscourts.gov/judicialfactsfigures/table5.2.htm. This case perfectly illustrates the misfit between the elimination of the availability of fees under Section 330(a)(1) and the goal of encouraging resort to Chapters 12 or 13. Because petitioner's client is a company, neither Chapter 12 nor Chapter 13 was ever an option.

At bottom, respondent ignores the many respects in which its interpretation does not fit with the statutory goals it imagines Congress might have been pursuing. Just a few examples demonstrate the point. If Congress had actually concluded that fees are merited in Chapter 12 and 13 cases (Br. 35), why would it have eliminated them for services that benefit the estate (as opposed to the debtor) in such cases or for all services in Chapter 12 business cases? If Congress had actually intended to draw a distinction based on whether creditors would be paid from post-petition assets (*id.* 35), why would it have eliminated

fees in Chapter 11 cases in which the debtor is out of possession? And if Congress had actually concluded that it was sufficient that individual debtors under Chapter 7 and debtors generally under Chapter 11 could pay their attorneys from pre- or post-petition assets (*id.* 37 & n.10), why would it have not applied the same approach in all forms of bankruptcy?

4. Petitioner's opening brief collected not "apocryphal allegations" (contra Resp. Br. 33) but an array of authorities – including the leading bankruptcy treatise and the judges in this very case – recognizing that respondent's construction will have genuine adverse consequences for bankruptcy administration. See Pet. Br. 31-34. Respondent's reading produces a "very powerful disincentive * * * to attorneys to accept Chapter 7 cases in the first place, or to provide anything beyond the most perfunctory required post-petition services." Pet. App. 42a.

The limited data collected by respondent does not undermine that showing. Respondent acknowledges that its position would prohibit the payment of fees from the estate in the approximately 40,000 Chapter 7 cases each year in which the estate has assets (Br. 38), which is a significant number. Moreover, these are precisely the cases – those in which the bankruptcy will actually be *litigated* rather than a simple liquidation – in which the presence of counsel is most important to bankruptcy administration.

Although respondent characterizes the duties of a debtor as "very limited" (Br. 40), it cites an array of responsibilities, many of which can be performed only with the assistance of counsel. Respondent acknowledges the obligations to attend a creditors meeting and to be prepared to answer questions regarding the assets and liabilities of the estate (11 U.S.C. 341); file a list of creditors and schedule of assets and liabilities (*id.* § 521(1)); file a statement regarding secured assets (*id.* § 521(2)); cooperate in the execution of the trustee's duties (*id.* § 521(3)); surrender relevant books and records (*id.* § 521(4)); appear at any discharge hearings (*id.* § 521(5)); cooperate in examining proofs of claim and identify real property (Bankr. R. 4002); and identify exempt property (*id.* R. 4003). Petitioner's opening brief also collected an array of case law, which respondent



ignores, demonstrating the many services performed by debtor's counsel, including in Chapter 7 cases, as in *United States Trustee* v. *Garvey*, 195 F.3d 1053, 1060 (CA9 1999), in which the debtor's attorney "filed the conversion petition, prepared schedules, amended reports, a statement of affairs, and a Rule 2015 report, communicated with creditors, and participated in 2004 examinations." The court accordingly recognized that "[i]nterpreting the ambiguous provision in § 330(a)(1) so as to eliminate the possibility of post-petition compensation for Chapter 7 debtor's attorneys would significantly alter the ability of Chapter 7 debtors to secure counsel in order to perform these services – a fundamental change in bankruptcy law." See generally Pet. Br. App. 29a-32a. The notion that an individual could undertake these tasks without a lawyer, much less that an officer of a corporation could do so in a complex bankruptcy proceeding, is not even a serious argument. Importantly, these are duties of the *debtor* that cannot be performed by an attorney retained by the trustee to represent the *estate*.

This very case is a perfect illustration. Respondent cannot, and does not, contest that the debtor in this case – a small mine-services company – would have been completely incapable of undertaking the responsibilities performed by petitioner, as required by the Code. See Pet. Br. 5-7, 30. Respondent does argue that *some* of these tasks "should have been performed by the trustee or counsel retained by the trustee." Br. 41. Many others, however, indisputably were the responsibility of the debtor's counsel. Further, respondent's view would produce a substantially less efficient bankruptcy system. Petitioner, as the attorney with the relationship with the debtor and the knowledge of the case, was best positioned to promptly resolve issues relating to the status of the estate. That is no doubt why both the judge and the trustee turned to him. Nor does anything in the Code preclude the debtor's counsel from undertaking such tasks, as even respondent implicitly acknowledges in arguing (Br. 37) that debtor's counsel can be paid for post-petition services through a pre-petition retainer or post-bankruptcy assets. And requiring the trustee regularly to secure judicial approval to hire the debtor's counsel would be a profound waste of resources.

Thus, although respondent quotes Judge Thomas's statement that "[i]n many Chapter 7 cases, there is little for the debtor's attorney to do after the petition is filed" (Br. 40 (quoting *In re Century Cleaning Servs.*, 195 F.3d 1053, 1064 (CA9 1999) (dissenting opinion))), it omits his *conclusion* that the distinction between classes of debtors drawn by respondent "makes no sense" (*id.* (quoting *In re Ames Dep't Stores*, 76 F.3d 66, 782 (CA2 1996))) and that, while "in the typical 'no asset' Chapter 7 case, there is little activity after the filing of the petition other than attendance at the section 341 hearing,"

> in *many cases*, the debtor's attorney is called upon to represent the debtor in post-petition adversary proceedings, Rule 2004 examinations, and in reaffirmation hearings. In more complex Chapter 7 bankruptcies, post-petition demands on the debtor's counsel *increase dramatically*. Categorical exclusion of fees can only result in denial of access to justice, with debtors unrepresented or under-represented. The increase in pro se cases, and in cases which become pro se after the petition is filed, does not aid the administration of our bankruptcy system.

*Id.* (emphases added).

* * * *

This case calls on the Court to interpret an inherently ambiguous statute. Of the two possible readings, petitioner's best comports with the text of the specific provision and the statute as a whole. It also best makes sense of the course of last-minute events that led to the introduction of the ambiguity. And, particularly important in the context of bankruptcy law, it comports with longstanding bankruptcy practice, from which Congress gave no indication of an intent to depart. The judgment of the court of appeals should accordingly be reversed.

## CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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